IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHELLE ERIN BERTHIAUME,

Respondent.
_____/

CASE NO.: SC08-1786

TFB NO.: 2008-10,621(20D)

THE FLORIDA BAR'S INITIAL BRIEF

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FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as “The Florida Bar” or “the Bar.” The Respondent, Michelle Erin Berthiaume, will be referred to as “Respondent.”

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC08-1786 held on April 14, April 15, May 22, and July 9, 2009. “SH (March 19, 2010)” will refer to the transcript of the Sanctions Hearing held on March 19, 2010, and “SH (May 19, 2010) with refer to the continued Sanctions Hearing held on May 19, 2010. "TFB Exh." will refer to exhibits presented by The Florida Bar and "R Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee. The Final Report of Referee dated July 1, 2010, will be referred to as "RR."

“Rule” or “Rules” will refer to the Rules Regulating The Florida Bar. “Standard” or “Standards” will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

This case involves Respondent's attempt to obtain bank records of a client who owed her money and had written her several dishonored checks. In an effort to obtain the client's bank records, Respondent created and issued a document she labeled "Subpoena Duces Tecum for Records." At the time she issued this document, there was no civil action pending and the purported "Subpoena" was not authorized by law.

The sequence of events began, on or about July 1, 2004, when Respondent was notified by her bank that several checks deposited to her account had been returned unpaid. TFB Exh. 5. The checks had been written by Respondent's client, George Furlan, on his business account at Pelican National Bank in the name of "International Marble & Granite of SW FL." The checks were in payment of legal fees owed to Respondent. TR4 581. The checks were stamped "Refer to Maker" as the reason for being returned unpaid. TFB Exhs. 5, 6a to 6d. Respondent's paralegal, Tanya Smith, called Pelican National Bank to inquire about the returned checks, and was told that funds were not available. TR3 414-16. On July 9, 2004, Respondent sent Mr. Furlan a statutory notice pursuant to Florida Statutes section 68.065, regarding each returned check and demanding payment within 30 days. TR4 587; TFB Exhs. 6, 6a, 6b, 6c, 6d. After waiting 30

days, on September 10, 2004, Respondent filed a Bad Check Complaint Form with the State Attorney's office for each dishonored check. TFB Exhs. 8, 8a, 8b, 8c, 8d. On September 21, 2004, the State Attorney's office sent Respondent a letter notifying her that the State Attorney was unable to pursue the Bad Check Complaints as a criminal matter for the reason that the checks were stamped "Refer to Maker." TFB Exh. 9. Respondent's paralegal, Tanya Smith, called the State Attorney's office. She was told there was nothing the State Attorney could do because the checks were stamped "Refer to Maker" rather than "NSF" (non sufficient funds). TR3 423.

Just a few days later, on September 25, 2004, Respondent signed and served by mail a document entitled "Subpoena Duces Tecum For Records" on Pelican National Bank. TFB Exh. 1, MEB 10-11. The purported "Subpoena" was drafted on Respondent's letterhead and did not include a case style. The purported subpoena contained the words "CIVIL ACTION," but did not reference the name or case number of any civil suit. The purported subpoena further stated: "**If you fail to produce these records and the above requested information as described, you may be held in contempt of court, punishable by a fine or incarceration or both**." The purported subpoena directed the Bank to produce bank account records and information relating to its customer George Furlan or

International Marble and Granite of SWFL. TFB Exh. 1, MEB 10-11. The Referee found by clear and convincing evidence that Respondent was responsible for including language threatening incarceration and contempt in the purported subpoena which was clearly designed to cause the Bank to produce the records without legal authority. RR 3. The Referee found that the language in the purported subpoena was "clearly misleading" and that Respondent "knowingly and deliberately" sent the purported subpoena with the offending language. RR 3.

The "Subpoena" was received by Pelican National Bank and reviewed by June Kossow, vice president of operations. TR2 164. When Ms. Kossow first saw the subpoena, she noticed it did not have a case number or case style on it and she thought this was odd. TR2 184-85. She also thought it was odd that an attorney would be requesting information on a check that was written to herself. TR2 185.

Ms. Kossow called Respondent's office and eventually spoke to someone who identified them self as "Michelle Berthiaume." TR2 208. Ms. Kossow identified herself and stated that the Bank would not be complying with the unauthorized subpoena. The person on the phone became agitated and insisted the Bank comply with the subpoena and produce the documents listed in the subpoena. TR2 209-211. Ms. Kossow testified that she remembered the conversation vividly because it was very upsetting to her; she was upset at being told to comply with a

subpoena she knew was not valid. TR2 213. The Referee found that the evidence was not clear and convincing that Respondent participated in this phone call. The Referee found it clear however, that someone who purported to be the Respondent and had knowledge of the subpoena participated in the call. RR 11. The Referee further found that Respondent was, at a minimum, made aware of the confrontational phone call after the fact and took no remedial action, and that this lack of remedial action subjected the Bar to disrepute. RR 11.

Ms. Kossow then contacted the Bank's legal counsel, Steven Kushner, of the law firm Becker & Poliakoff, P.A., and forwarded to him a copy of the purported subpoena. TR1 125. Mr. Kushner checked the Clerk of Court's website and determined that a civil action was not pending. TR1 127-28. After investigating the matter, he determined that the subpoena was not authentic. TR1 132. Mr. Kushner was concerned about the possible ramifications to the Bank if it complied with a subpoena that was not valid, including potential violations of federal regulations and the imposition of fines. TR1 136-137. On the other hand, Mr. Kushner was also concerned that the Bank could be exposed to a finding of contempt if it failed to comply with a subpoena that was, in fact, valid. TR1 138-39. On October 5, 2004, Mr. Kushner sent a letter to Respondent, expressing his concerns about the "subpoena," and advising that he was recommending to the

bank that they not comply with the document. TFB Exh. 2, MEB 17. The Bank incurred legal fees for the time spent by Mr. Kushner in investigating the purported "Subpoena" and preparing the letter to Respondent. TFB Exh. 17; SH 50-53 (March 19, 2010). Respondent did not respond to Mr. Kushner's letter. Neither Respondent nor anyone from her office ever called Mr. Kushner to provide an explanation or to indicate that the "Subpoena Duces Tecum for Records" was not actually a valid subpoena. TR1 142-43. The Referee found that "Respondent offered no apology and took no remedial action." RR 11.

The purported subpoena was also reviewed by Michael Whitt of the Becker & Poliakoff firm who represented the Bank in litigation matters. TR2 260. Employees of the Bank expressed to Mr. Whitt their dismay at having received the purported "Supoena." Bank employees had already spent time pulling and compiling records to comply with what later turned out to be an invalid subpoena. They were very upset about the situation. SH 37, 55 (March 19, 2010).

After researching the document, Mr. Whitt concluded that it was not a proper subpoena. TR2 264, 300. Mr. Whitt was particularly concerned about the language in the document that threatened contempt for failure to comply. This language would tend to lead a nonlawyer who received it to believe they could be fined or jailed if they did not respond. SH 42 (March 19, 2010). Like Mr.

Kushner, Mr. Whitt was concerned that if the Bank provided documents on one of its depositors, it may face potential liability under banking regulations that protect the privacy of those bank records. TR2 276-77. Bank employees expressed to Mr. Whitt their concern about how close they came to violating banking regulations because of the improper subpoena. SH 60 (March 19, 2010). Mr. Whitt advised the Bank not to honor the purported subpoena. TR2 278.

Mr. Whitt was also concerned about the harm to the profession caused by an attorney abusing the subpoena power. Mr. Whitt was concerned that an attorney may have violated a privilege recently granted by rule of The Florida Supreme Court allowing attorneys to issue subpoenas. He expressed concern that if the privilege were to be abused by attorneys in Florida, the privilege could be taken away. TR2 280; SH 56-59 (March 19, 2010). Mr. Whitt filed a grievance with The Florida Bar complaining about Respondent's conduct. TFB Exh. 1; TR2 266; SH 45-46 (March 19, 2010). Respondent sent a letter of response to the Bar in which she defended her conduct and lashed out at Mr. Whitt, stating that she found his statements to be "libelous and without merit." TFB Exh. 2.

At the final hearing, Respondent testified that she never intended the document to be a subpoena or to go out in the form that it was sent. TR5 644. She testified that her secretary, Gail Burkham, prepared the document. According to

Respondent, she instructed Ms. Burkham to take out any language referencing a subpoena and to put the document on letterhead in the form of a demand letter. TR4 596-97. Respondent testified that she marked several changes on the first page of the document, signed the certificate of service on the second page, and then left to go to court. TR4 598. She testified that the first time she really looked at the document was when the Bar complaint came in. TR4 603.

In the initial stages of the disciplinary proceedings, Respondent took a different position concerning the creation of the "Subpoena." In her written responses to the Bar and in her testimony before the grievance committee, Respondent took the position that she was authorized by the Rules of Civil Procedure to issue the "Subpoena." TFB Exh. 2; TR5 647-48. In her initial response to the Bar concerning the grievance, Respondent described the document she sent the bank as "an attorney subpoena." TFB Exh. 2. In a follow-up inquiry, Respondent was asked to provide the legal authority for the "attorney subpoena" she sent to Pelican National Bank. In a letter of response to the Bar, Respondent stated that the Florida Rules of Civil Procedure authorized her to issue the "attorney subpoena." TFB Exh. 4.

The grievance against Respondent was initially referred for investigation to the Twentieth Judicial Grievance Committee "A". On January 27, 2006, in TFB

File No. 2005-10,817(20A), the grievance committee voted to find no probable cause with a letter of advice. R. Exh. 4. The Designated Reviewer for the Committee rejected the Grievance Committee's action and referred the matter to the Disciplinary Review Committee of The Florida Bar Board of Governors with a recommendation that probable cause be found. R. Exh. 3. At its April 2006 meeting, the Board of Governors overturned the finding of no probable cause and found probable cause for violation of the Rules Regulating The Florida Bar. The Bar filed a Complaint and the Honorable Judy Goldman was assigned as Referee. Based on Respondent's claim that the Designated Reviewer had a conflict of interest, the parties agreed to a dismissal without prejudice and a new grievance committee was assigned to investigate the case. RR 12. The matter was subsequently referred to the Twentieth Judicial Grievance Committee "D." After an evidentiary hearing, the Grievance Committee made a finding of probable cause on June 26, 2008.

The Bar filed its Complaint on September 18, 2008. Respondent was charged with violating Rules 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice), Rule 4-4.1 (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person), Rule 4-

4.4 (in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person); and Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

On September 25, 2008, the Honorable Judy Goldman was appointed as Referee. The final hearing was held on April 14, April 15, May 22, and July 9, 2009. Respondent was represented by counsel at the final hearing. The Florida Bar presented the testimony of Steven Kushner, June Kossow, Michael Whitt (the complainant), and Gail Burkham. Respondent presented the testimony of Tanya Smith and Dan Gerleman, and testified on her own behalf. On July 9, 2009, the Referee made a verbal pronouncement as to guilt, finding Respondent guilty of violating Rule 4-8.4(d) (conduct prejudicial to the administration of justice). A sanctions hearing was held on March 19, 2010 and May 19, 2010. The Florida Bar presented the testimony of Michael Whitt, and Respondent presented the testimony of several character witnesses and her own testimony. The Florida Bar sought the sanction of a 90-day suspension. On May 19, 2010, the Referee made a verbal pronouncement of her recommendation of a 10-day suspension. On July 1, 2010, the Referee issued a Report of Referee, recommending that Respondent be found

guilty of violating Rule 4-8.4(d) and not guilty of violating Rules 4-4.1, 4-4.4, and 4-8.4(c). The Referee recommended that Respondent receive a 10-day suspension. The Report of Referee was considered by the Board of Governors of The Florida Bar at its meeting ending July 23, 2010. The Board of Governors voted to seek review of the Referee's finding of not guilty as to Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, and misrepresentation), and the Referee's recommended discipline of a 10-day suspension. The Board of Governors voted to seek a suspension of 91 days. The Bar does not challenge the factual findings made by the Referee.

On August 24, 2010, The Florida Bar filed a Petition for Review of the Report of Referee. On September 3, 2010, Respondent filed a Cross-Petition for Review, challenging the Referee's findings of guilt and the recommended sanction. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

SUMMARY OF THE ARGUMENT

In an attempt to obtain bank records of a client who owed her money, Respondent sent a document labeled "Subpoena Duces Tecum" to the bank. At the time she issued this document, there was no civil action pending and the purported "Subpoena" was not authorized by law. The "Subpoena" contained language threatening incarceration and contempt if the bank did not comply. The Referee found that the purported subpoena was clearly misleading, and that Respondent knowingly and deliberately sent the document. The Referee found Respondent guilty of violating Rule 4-8.4(d) (conduct prejudicial to the administration of justice), but not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The Referee recommended the sanction of a 10-day suspension.

The Referee erred in finding Respondent not guilty of violating Rule 4-8.4(c). Respondent was responsible for sending a document that was deceptive on its face. By knowingly sending the unauthorized "Subpoena," Respondent engaged in intentional misconduct designed to mislead the Bank. Respondent's misconduct caused harm or potential harm to the Bank and its employees, her client, and the legal profession. Respondent's intentionally misleading conduct warrants a suspension of 91 days.

STANDARD OF REVIEW

The party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *Fla. Bar v. Nicnick*, 963 So.2d 219, 221 (Fla. 2007). If the referee's findings are supported by competent, substantial evidence, then this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *Fla. Bar v. Porter*, 684 So.2d 810, 813 (Fla. 1996). Because the referee is in the best position to judge the credibility of witnesses, this Court defers to the referee's assessments. *Fla. Bar v. Forrester*, 916 So.2d 647, 652 (Fla. 2005).

A referee's recommended sanction in an attorney disciplinary proceeding is persuasive, but this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Kossow*, 912 So.2d 544, 546 (Fla. 2005). Generally speaking, this Court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw or in the Florida Standards for Imposing Lawyer Sanctions. *Id*.

ARGUMENT

I. RESPONDENT VIOLATED RULE 4-8.4(C) BY KNOWINGLY SENDING AN UNAUTHORIZED SUBPOENA TO THE BANK THAT WAS CLEARLY MISLEADING AND DESIGNED TO OBTAIN BANK RECORDS OF A CLIENT.

The Referee found Respondent guilty of violating Rule 4-8.4(d) (conduct that is prejudicial to the administration of justice), but not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The Referee's finding of not guilty as to Rule 4-8.4(c) is not supported by the competent, substantial evidence in the record and is inconsistent with the Referee's other findings.

In the Report of Referee, the Referee made the following findings:

> I find by clear and convincing evidence that Respondent is responsible for including language threatening incarceration and contempt in the purported subpoena which was clearly designed to cause the Bank to produce the records without legal authority. The language in the purported subpoena was clearly misleading. Respondent knowingly and deliberately sent the purported subpoena with the offending language. RR 3.

Thus, the Referee found that Respondent knowing and deliberately sent the purported subpoena and that she was responsible for including language in the purported subpoena that was "clearly misleading." Because the Referee found that Respondent knowingly engaged in conduct designed to mislead the Bank, the

Referee erred in finding Respondent not guilty of violating Rule 4-8.4(c).

In the Report of Referee, the Referee cited *Florida Bar v. Varner*, 780 So.2d 1 (Fla. 2001), specifically noting the similarity of the conduct in *Varner* to that in the present case. RR 6. In *Varner*, the responding attorney mistakenly informed an insurance company that a lawsuit had been filed. In order to obtain a minimal settlement, he agreed to dismiss the case and send the insurance company a notice of voluntary dismissal. 780 So.2d at 2. When Varner discovered that he had incorrectly stated a case had been filed, instead of admitting his mistake, he filled in a fictitious file number on the notice, signed it and mailed it to the insurer. *Id*. For placing a fictitious file number on the notice of voluntary dismissal and forwarding the same to State Farm, the referee in *Varner* recommended that he be found guilty of violating rule 3-4.3 (any act that is contrary to honesty and justice) and 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The referee found Varner not guilty of several rules, including rules 4-4.1(a) (knowingly making false statement of material fact or law to a third person) and 4-8.4(d) (conduct prejudicial to administration of justice). *Id*.

The Florida Supreme Court approved the referee's guilty findings as to Rules 3-4.3 and 4-8.4(c), and found Varner guilty of violating Rules 4-4.1(a) and 4-8.4(d). The Court found that Varner knew a suit had not been filed when he

mailed the notice of voluntary dismissal with a fictitious case number. The Court found that the document contained a false statement of fact in that the case number was nonexistent, and also falsely implied that a lawsuit had been filed. 780 So.2d at 3.

Respondent's conduct in signing and mailing the purported subpoena is strikingly similar to that of the respondent in *Varner*. Both Varner and Respondent created documents designed to be misleading. Unlike Varner, who was attempting to cover up a previous mistake, Respondent was attempting to obtain client records without legal authority. Although Respondent did not insert a fictitious case number or case name on the purported subpoena, she included the title "CIVIL ACTION" and the language: "If you fail to produce these records and the above requested information as described, you may be held in contempt of court, punishable by a fine or incarceration or both." TFB Exh. 1, MEB 10-11. The Referee found that this language was "clearly misleading" and "clearly designed to cause the Bank to produce the records without legal authority." RR 3. In comparing Respondent's conduct to that of Varner, the Referee noted that, "[i]n Varner, there was no dispute that Varner executed a fictitious notice. Here, there is no dispute that there is a signature of Respondent on the purported subpoena, and that it was mailed from her office." RR 6-7.

Respondent testified at the final hearing that she never intended the document to be a subpoena or go out in the form that it did. TR5 644. Much of the evidence and argument during the final hearing was focused on Respondent's inconsistent explanations for her conduct: 1) her initial position that she was authorized under the Rules of Civil Procedure in sending an "attorney subpoena," and 2) her later testimony that her secretary prepared the purported subpoena and failed to change it as instructed before mailing it. In the Report of Referee, the Referee acknowledged the inconsistencies in Respondent's testimony, and found both versions to be problematic. The Referee found that none of the explanations provided by Respondent were sufficient to absolve her of misconduct. RR 9. Under either version, Respondent was guilty of violating the Rules because her conduct was intentional.

This Court has held that in order to satisfy the element of intent under Rule 4-8.4(c), it must only be shown that the conduct was deliberate or knowing. *Florida Bar v. Riggs*, 944 So.2d 167, 171 (Fla. 2006), quoting *Florida Bar v. Fredericks*, 731 So.2d 1249 (Fla. 1999). In *Riggs*, the respondent blamed a shortage of funds in his trust account on his employee's mishandling of the account. Riggs disputed the referee's finding of a violation of rule 4-8.4(c), claiming that he did not have the requisite intent. This Court held that the motive

behind an attorney's action in not the determinative factor. Rather the issue is whether the attorney deliberately knowingly engaged in the activity in question. This Court held that Riggs' failure to supervise his employee constituted intent because he knowingly assigned his trust account responsibilities to his paralegal and then failed to manage her activities. This Court found that "knowingly or negligently engaging in sloppy bookkeeping amounts to intent under rule 4-8.4(c)." *Id*. In another recent case, *Florida Bar v. Shankman*, ____ So.3d ____, 2010 WL 2680248(Fla.), this Court disapproved the referee's finding that the respondent was not guilty of violating Rule 4-8.4(c). The referee had found that the Bar failed to present clear and convincing evidence establishing intent. This Court emphasized that the issue in satisfying the element of intent is whether the respondent "deliberately or knowingly engaged in the activity in question." *Shankman* at 5, quoting *Florida Bar v. Head*, 27 So.3d 1, at 9.

The Referee found that Respondent was responsible for including the threatening language contained in the subpoena and that she knowingly sent it. RR 3. Thus, even under Respondent's most recent version of events (her testimony at the final hearing that she instructed her secretary to change the document before sending it out), she engaged in intentional conduct by knowingly failing to supervise her employee. *Riggs, supra*. Respondent acted deliberately and

knowingly when she sent the purported subpoena to the Bank.

In the Report of Referee, the Referee found *Florida Bar v. Head, supra*, to be instructive. RR 7. The Referee specifically quoted this Court's statement that "'basic fundamental dishonesty is a serious flaw, which cannot be tolerated because dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.' *Florida Bar v. Rotstein*, 835 So.2d 242, 246 (Fla. 2002). Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole.'" RR 7, quoting *Head*, 27 So. 3d at 7. *See* SH 20-21 (May 19, 2010). However, despite emphasizing the importance of honesty and truthfulness in a member of the legal profession, and despite finding Respondent's conduct clearly misleading, the Referee nevertheless declined to find Respondent guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, and misrepresentation).

The Referee erred in finding Respondent not guilty of violating Rule 4-8.4(c). Respondent intentionally included language in the purported subpoena designed to cause the Bank to produce the records without legal authority. She knowingly and deliberately sent the subpoena with the offending language. Respondent's conduct was dishonest and intentionally misleading in violation of Rule 4-8.4(c).

II. A 91-DAY SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S INTENTIONAL AND MISLEADING CONDUCT.

The Referee recommended a 10-day suspension. The Florida Bar submits that a 10-day suspension does not have a reasonable basis in the case law or the Florida Standards for Imposing Lawyer Sanctions. The Bar submits that a 91-day suspension is the appropriate sanction for Respondent's intentionally misleading conduct.

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar counsel, Referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters. The Referee found that the following standards apply to Respondent's conduct:

6.2 Abuse of the Legal Process.

6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

7.0 Violations of Other Duties Owed as a Professional

7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

In this case, suspension is appropriate under Standards 6.22 and 7.2. By sending the subpoena, Respondent violated a court rule and a duty owed as a professional. By sending a document falsely labeled as a subpoena and invoking the court's power of contempt, Respondent violated the Florida Rules of Civil Procedure, and thereby violated a court rule. Respondent's conduct caused potential injury to Pelican National Bank, June Kossow, and George Furlan. By sending the purported subpoena to Pelican National Bank, Respondent put the Bank and its employees at risk of violating federal and state law if they had complied with the "Subpoena" and had produced the requested documents. The conduct may also have invaded the privacy rights of Respondent's client, George Furlan, if his private banking records had been procured through the use of the fictitious subpoena. TR1 136-37; TR2 276-77. Respondent also caused actual harm to the Bank by causing the Bank to incur the cost of counsel to deal with the purported "Subpoena." TFB Exh. 17; SH 50 (March 19, 2010).

Respondent's conduct also caused harm to the legal profession. As Michael Whitt testified, it hurts the reputation of lawyers in the eyes of the public when a lawyer abuses the subpoena privilege granted to lawyers by the Florida Supreme Court in an attempt obtain documents in a manner they are not lawfully entitled to do. SH 55-59 (March 19, 2010). The Referee specifically credited the testimony

of Mr. Whitt when the Referee found that it was Respondent's "obvious design" to have a third party or person rely on the contempt/incarceration language of the offending subpoena without court authority and with no pending case. SH 5, 7 (May 19, 2010). The Referee found that "it hurts all of our reputation as lawyers when you're trying to get something that you're not otherwise legally entitled to by invoking the Court's subpoena power in this case." SH 7 (May 19, 2010). In the Report of Referee, the Referee found that "Respondent resorted to a type of self help that subjected the Bar to disrepute." RR 10.

While it is clear that the Standards support a suspension in this case, the Standards do not provide guidance as to the appropriate length of the suspension to be imposed. Standard 3.0, however, directs the court to consider the following factors in imposing a sanction:

(1) the duty violated;
(2) the lawyer's mental state;
(3) the potential or actual injury caused by the lawyer's misconduct;
(4) the existence of aggravating or mitigating circumstances.

Consideration of these factors, in conjunction with the relevant case law, supports the imposition of a longer sanction for Respondent's misconduct. As discussed above, Respondent violated important duties, and in so doing, caused both potential and actual harm. In this case, although the Referee made no specific findings of aggravating factors in her Report, the Referee referred to aggravating

factors in her verbal findings.[1] The Referee also made a number of findings that are relevant to Respondent's mental state and the duties violated. The Bar requested a finding of two aggravating factors--dishonest or selfish motive, and the submission of false evidence, false statements or other deceptive practices during the disciplinary process. In the Report of Referee, the Referee specifically declined to make a determination whether Respondent gave false testimony and made false statements during the disciplinary process. RR 9. The Referee found, however, that Respondent's explanation of how and why she sent the subpoena changed over the course of the disciplinary process. The Referee also found "Respondent's explanation of her conduct to be contradictory, confusing and inconsistent." RR 9.

The Referee found four mitigating factors: absence of a prior disciplinary record; inexperience in the practice of law; character or reputation; and interim rehabilitation. RR 9. The Referee rejected numerous additional mitigating factors

[1] At the Sanctions Hearing, the Referee stated "I think the aggravating factor is clear . . . that, you know, it was an intentional intent to have a third party rely on the court's inherent power to impose contempt and incarceration with no authority of the Court and no pending case which would otherwise confer that authority, and that that was an obvious design. . . . It was her clear intent to do this and I think that's an aggravating factor. . . ." SH 7 (May 19, 2010). The Referee also stated: "Another aggravating factor was the bank was affected and no apology was ever made to them." SH 7-8 (May 19, 2010).

requested by Respondent. In addressing the lack of additional mitigating factors, the Referee found that Respondent, although attempting to collect a just debt, acted in self interest and resorted to a type of self-help that subjected the Bar to disrepute. RR 10. The Referee also found that Respondent offered no apology for her conduct and took no remedial action. RR 11. The Referee further found that although the evidence was not clear and convincing that Respondent participated in a confrontational phone call with a bank officer, she was aware of the phone call and took no remedial action. The Referee found that this lack of remedial action subjected the Bar to further disrepute. RR 11.

These findings by the Referee, although not specifically found to be aggravating factors, should be considered in determining the appropriate discipline. Standard 3.0 provides that, in imposing an appropriate sanction, it is important to consider the duties violated, the lawyer's mental state, and the potential or actual injury caused by the lawyer's misconduct, as well as the existence of aggravating or mitigating circumstances. The Referee's findings that Respondent had a self interest in collecting the debt owed her by Mr. Furlan, and that she resorted to self help in a manner that subjected the profession to disrepute, are relevant to the duties violated, Respondent's mental state, and the potential or actual injury caused. Similarly, Respondent's failure to apologize or take remedial action for

sending the subpoena, or for the confrontational phone call, are further evidence of Respondent's mental state and the duties violated.

Although the Referee found several mitigating factors, including extraordinary pro bono service, these mitigating factors are insufficient to outweigh the seriousness of Respondent's conduct. Acting in her own self-interest, Respondent disregarded the rules of civil procedures and resorted to a form of self-help in an attempt to collect monies owed her. Respondent created a fictitious subpoena containing language threatening contempt if the Bank did not comply and sent it to the Bank. When the Bank questioned the validity of the subpoena, Respondent made no attempt to apologize or even acknowledge her actions. She attacked her accuser and failed to atone for a "testy" phone conversation between someone in her office who identified themselves as the Respondent and June Kossow. TR2 213. The Florida Bar submits that Respondent's conduct warrants the sanction of a 91-day suspension, requiring that Respondent demonstrate rehabilitation prior to being reinstated to the practice of law.

In this case, the Referee relied on *Florida Bar v. Varner, supra*, in making her recommendations. RR 6. As discussed previously, the conduct in *Varner* is analogous to that of Respondent. Varner prepared a notice of dismissal with a fictitious case number and sent it to the opposing party in order to cover up his

mistake in representing that a lawsuit had been filed. This Court found that Varner "creat[ed] a fictitious court document that was cloaked with the aura of authenticity. Such misuse of official documents is conduct prejudicial to the administration of justice." 780 So.2d 1, at 4. In creating and sending an unauthorized subpoena, Respondent, like Varner, created a fictitious document that "invoked the power and prestige of the court." *Id*.

The referee found Varner guilty of violating Rules 3-4.3 and 4-8.4(c), and recommended a 30-day suspension. This Court found that Varner also violated Rules 4-4.1(a), 4-8.4(d), and 4-8.4(b), and imposed a suspension of 90 days. In *Varner*, like the instant case, the referee found no aggravating factors. In mitigation, the referee found that Varner made a good faith effort at restitution and correcting the consequences of his misconduct, that he had a good character and reputation, and that he was remorseful.

The Bar submits that Respondent's conduct warrants a harsher sanction than the 90-day suspension imposed in *Varner*. Unlike Varner, Respondent did **not** make a good faith effort to correct the consequences of her misconduct. The Referee rejected finding this mitigating factor and found that Respondent offered no apology and took no remedial action. RR 11. *See* SH 7-8 (May 19, 2010). The Referee also found that although Respondent was aware of a disturbing phone call

between someone purporting to be Respondent and a bank officer, she took no remedial action. RR 11.

Unlike Varner, Respondent was **not** remorseful. The Referee rejected finding this mitigating factor and found that any remorse shown by Respondent was untimely. The Referee found that Respondent attacked the complainant in her written response to the initial Bar complaint and showed no genuine remorse until she testified at the final hearing. RR 11. In addition, although the Referee declined to make a determination concerning whether Respondent made false statements during the disciplinary process, the Referee found that Respondent's explanation for her conduct changed over the course of the proceedings and was "contradictory, confusing and inconsistent." RR 9. The Referee also emphasized the harm to the legal system caused by Respondent's conduct in intentionally invoking the power of the court without authority in the purported "subpoena." SH 5, 7 (May 19, 2010).

In *Florida Bar v. Head*, 27 So.3d 1 (Fla. 2010), this Court suspended an attorney for one year for dishonest conduct in representing debtors in a bankruptcy case. Head made misrepresentations to the court and to others. His misconduct included knowingly filing a Suggestion of Bankruptcy with the court, even though no petition for bankruptcy had been filed. Head also engaged in a conflict of

interest by taking $10,000 in fees from refinancing proceeds intended to pay off his clients' creditor and was not forthcoming about his receipt of the funds. Although Head's misconduct is arguably more egregious than that of Respondent, the case is instructive because it shows that this Court considers violations of Rules 4-8.4(c) and 4-8.4(d) to be serious misconduct. This Court rejected Head's argument that his misconduct was "minor," stating:

> [T]he Court does not view violations of rules 4-8.4(c) . . . and rule 4-8.4(d) . . . as minor. The Court has clearly stated that "basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated" because dishonesty and a lack of candor "cannot be tolerated by a profession that relies on the truthfulness of its members." *Fla. Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2002). Dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system as a whole.

27 So.3d at 8-9.

In holding that Head's violations of rules 4-8.4(c) and (d) merited a "serious sanction," this Court cited Head's conduct in knowingly filing a misleading Suggestion of Bankruptcy even though no bankruptcy petition had been filed, and his failure to be forthcoming about the receipt of $10,000 from the refinance loan. *Id*. at 9. In this case, Respondent similarly filed a misleading document falsely labeled as a "Subpoena Duces Tecum" even though no civil case was pending. Because Respondent's misconduct was dishonest and misleading, it warrants the sanction of a rehabilitative suspension of 91 days. Recent opinions of this Court

have noted that "this Court has moved towards stronger sanctions for attorney misconduct in recent years." *Florida Bar v. Herman*, 8 So.3d 1100, 1108 (Fla. 2009), quoting *Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2003). Even the Referee acknowledged, at the conclusion of this disciplinary proceeding, that she had imposed "a very modest penalty based on some mitigating factors" and warned Respondent that she might have to consider a harsher sanction. SH 43 (May 19, 2010).

The type of conduct committed by Respondent has been found to warrant a 91-day rehabilitative suspension. *See Florida Bar v. Steinberg*, 977 So. 2d 579 (Fla. 2008) (approving Report of Referee dated April 27, 2007). The facts of *Steinberg* are very similar to the facts of this case. The respondent in *Steinberg* manufactured a false subpoena in a non-existent case and mailed it to the telephone company in order to obtain the personal cellular phone records of an individual he believed was having an intimate relationship with his wife. Steinberg prepared the false subpoena using fictitious names and the random case number of a real case. At the time he prepared and mailed the false subpoena, Steinberg was not party to a dissolution of marriage action or any other action, was not counsel of record in any case which would entitle him to use the subpoena power of the court to obtain the individual's private cell phone records. Report of Referee, p. 6.

The referee found Steinburg guilty of violating Rules 3-4.3, 4-8.4(b), 4-8.4(c), and 4-8.4(d). Report of Referee, p. 9. Despite Steinberg's lack of a prior disciplinary record, the referee recommended that Steinberg be suspended for 91days, finding his issuance of a false subpoena to be serious misconduct. The referee noted that the language of the respondent's false subpoena invoked the power and authority of the court by stating in capital letters, "YOU ARE COMMANDED" and "YOU ARE SUBPOENAED" [to deliver documents]. The referee stated "Creating a false subpoena commanding compliance usurps the judicial prerogative, and violates the sanctity of court proceedings . . . . " Report of Referee, p. 12. The referee found that the use of the fraudulent subpoena caused harm not only to the individuals involved, but also to "the legal profession itself, which is damaged whenever officers of the court misuse official process for their own ends." Report of Referee, p. 13. The referee's recommendation of a 91-day suspension was approved by this Court in a decision without published opinion. *Florida Bar v. Steinberg*, 977 So. 2d 579 (Fla. 2008). Like Steinberg, Respondent invoked the power of the court in order to obtain documents by issuing an unauthorized subpoena. Like Steinberg, her conduct warrants a rehabilitative suspension of 91 days.

CONCLUSION

The record evidence and the Referee's factual findings support a finding that Respondent violated Rule 4-8.4(c). This Court should disapprove the Referee's finding of not guilty and find Respondent guilty of violating Rule 4-8.4(c). As to discipline, this Court should disapprove the Referee's recommendation of a 10-day suspension and suspend Respondent from the practice of law for 91 days. Respondent should be assessed the costs of this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by UPS Delivery, Tracking Number **1ZE3277W2210001670**, to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1900; a true and correct copy by regular U.S. Mail to **G. Michael Keenan**, Counsel for Respondent, 1532 Old Okeechobee Road, Suite 103, West Palm Beach, Florida 33409; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of September, 2010.

_____
Henry Lee Paul
Bar Counsel

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Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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Henry Lee Paul
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